LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
DEC 1

IN THE

Supreme Court of the United States

OCTOBER TERM—1961

No. 580

THE STATE OF NEW JERSEY,

Respondent,

vs.

ANTHONY JOSEPH FIORELLO,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

JOSEPH F. WALSH,
Counsel for Petitioner,
786 Broad Street,
Newark 2, New Jersey.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

TABLE OF CONTENTS

	PAGE
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
The Facts Material to the Questions Presented	4
Reasons for Granting the Writ	7
Conclusion	9
Appendix "A"—Opinion of the Superior Court of New Jersey, Appellate Division	1a
Appendix "B"—Opinion of the Supreme Court of New Jersey (No. A-15, September Term, 1961)	13a
Appendix "C"—Mandate on Reversal of the Supreme Court of New Jersey	26a

Cases Cited

Akins v. State of Texas, 325 U. S. 398, 65 S. Ct. 1276, 89 L. Ed. 1692	9
Moore v. Dempsey, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543	9
Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791	9
Niemotko v. State of Maryland, 340 U. S. 268, 71 S. Ct. 325	2
Schware v. Board of Bar Examiners of State of N. M., 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796	8

PAGE

State v. Bricker, 99 N. J. L. 521 (E. & A., 1924) 7

State v. Donohue, 2 N. J. 381 (1949) 7

State v. Fox, 12 N. J. Super. 132 (App. Div., 1951) ... 7

State v. Kuznitz, 36 N. J. Super. 521 (App. Div., 1955), cert. denied, 20 N. J. 136 (1955) 8

State v. Walsh, 9 N. J. Super. 43 (App. Div., 1950) ... 7

Thompson v. City of Louisville, et al., 362 U. S. 199, 80 S. Ct. 624 ..... 2, 8

Tot v. United States, 319 U. S. 463, 63 S. Ct. 1241, 87 L. Ed. 1519 (concurring opinion) 9

United States ex rel. Vajtauer v. Commissioner of Immigration of Port of New York, 273 U. S. 103, 47 S. Ct. 302, 71 L. Ed. 560 ..... 8, 9

Yick Wo. v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 9

United States Constitution Cited

Fourteenth Amendment 2, 7

Sec. 1 3

Statutes Cited

N.J.S. 2A:112-3 ..... 1, 3

28 U.S.C.A.:

Sec. 1257(3) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No.

STATE OF NEW JERSEY,

Respondent,

vs.

ANTHONY JOSEPH FIORELLA,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

To the Honorable Chief Justice and the Honorable Justices of the Supreme Court of the United States:

The petition of Anthony Joseph Fiorella prays that a writ of *certiorari* issue to review the judgment of the Supreme Court of the State of New Jersey, entered in the above entitled case on November 6, 1961, which reinstated his conviction for a violation of N.J.S. 2A:112-3.

Opinions Below

The Somerset County Court did not write an opinion.

Written opinions were filed by the Hon. VICTOR S. KILKENNY, Judge of the Superior Court of New Jersey, Appellate Division February 27, 1961 and by Hon. NATHAN L.

JACOBS for the Supreme Court of the State of New Jersey on November 6, 1961. Neither of these opinions has been officially reported as yet and both are printed *infra*.

Jurisdiction

The judgment of the Supreme Court of the State of New Jersey was pronounced on November 6, 1961, and there were no orders entered respecting a re-hearing or the granting of an extension of time within which to petition for *certiorari*. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257(3).

It is believed that the following cases sustain the jurisdiction of this Court: *Niemotko* v. *State of Maryland*, 340 U. S. 268, 71 S. Ct. 325; *Thompson* v. *City of Louisville, et al.*, 362 U. S. 199, 80 S. Ct. 624.

Questions Presented

1. Whether the conviction of the petitioner herein, being unsupported by any direct evidence of guilt, violates the due process clause of the Fourteenth Amendment.

2. When at the conclusion of the State's case involving a charge of bookmaking, no proof appeared against the defendant other than circumstantial evidence, which was as indicative of innocence as of guilt, was not the defendant denied due process by a denial of a judgment of acquittal and, in effect, compelled to prove his innocence?

3. By the terms of the ruling sought to be reviewed, was not the State relieved of the burden of proving the guilt of the defendant?

4. Does not the ruling sought to be reviewed single out persons charged with the crime of bookmaking into a separate class and provide for their trial under rules of law contrary to all known principles of justice?

Constitutional Provisions Involved

The due process clause of section 1 of the Fourteenth Amendment to the United States Constitution.

Statute Involved

Petitioner was indicted, convicted and sentenced under the provisions of N.J.S. 2A:112-3. The questions presented in this petition do not involve the statute.

Statement of the Case

(All references are to the appendix filed in the court below.)

The Somerset County Grand Jury returned a two-count indictment against the defendant. The first count charged that the defendant "on the 9th day of January, 1960 and on divers days and dates prior thereto * * * willfully and unlawfully did conduct the practice commonly known as bookmaking, upon the outcome of sporting games and contests contrary to the provision of N.J.S. 2A:112-3, * * *" The second count charged the defendant with keeping a place to which persons might resort for gambling on the 9th day of January, 1960 and on divers days and dates prior thereto (D1a).

At the conclusion of the State's case the defendant moved for a judgment of acquittal of both offenses charged in the indictment. The Court granted the defendant's motion as to the Second Count (D63a-9) but denied the motion as to the First Count (D63a-11). After the presentation of the defendants' case, the jury found the defendant guilty of the charge contained in the First Count of the indictment (D111a-19). The defendant's motion for a new trial was denied (D121a). The Court sentenced the defendant to a term of not less than 18 months nor more than three years in New Jersey State Prison and fined him $5,000.00 (D114a-3 to 14).

On appeal to the Appellate Division of the Superior Court of New Jersey, the conviction was reversed on the ground "the circumstantial evidence * * * was not sufficient, when the defendant made his motion for acquittal, to permit the jury to find beyond a reasonable doubt that the defendant was guilty of the crimes charged in the indictment" (Ps9a-34 to 38).

The State of New Jersey then filed a petition for *certiorari* in the Supreme Court of the State of New Jersey. The Supreme Court granted that petition, heard the case, and in an opinion dated November 6, 1961, reversed the Appellate Division and reinstated the conviction.

The Facts Material to the Questions Presented

Richard A. Martin of the New Jersey State Police testified that he and one Detective Karkowski on January 9, 1960, conducted a raid on a garage located in North Plainfield, New Jersey, which was owned and operated by the petitioner herein. A search of the premises other persons present, and the defendant disclosed the State's evidence, Exhibits S-1 (D115a), S-2 (D117a) and S-3 (D119a), all found on the person of the defendant (the defendant having been stripped naked (D17a-40). He further testified that the defendant told him that he (the defendant) wrote the numbers on S-1 and S-2. During the course of the search two telephone calls were received, and the witness testified that he answered both calls. The first caller asked for "Tony" (D6a-32). The second caller also asked for "Tony", the caller identifying himself as "Freddie" the brother-in-law of "Tony". The defendant informed the witness that he did not have a brother-in-law by that name (D9a-9 to 15). The witness further testified that Exhibit S-3 was obtained from the defendant when the witness heard a crackling of paper (D7a-11), turned around and saw that the defendant had his hands folded behind his

back. The palm of the defendant's left hand contained Exhibit S-3. Here again the defendant acknowledged that he wrote the notations on Exhibit S-3 (D8a-6), obtaining the information from the Newark Star Ledger, that it represented "the line from the paper" and the time that the games were to be played (D8a-30 to 34). The witness also testified that $164.00 in bills and $1.00 in change was taken from the defendant (D9a-19).

The second and last witness for the State was the State Police Detective Joseph Karkowski, an expert on the meaning of records, symbols and writings connected with the activity of bookmaking (D22a-36 to 40). He testified that Exhibit S-1 "could represent what is commonly known as a tally sheet or record sheet" (D24a-31 to 34); that Exhibit S-2 "could represent a tally or a record sheet" (D25a-9) and Exhibit S-3 "could represent what is commonly known as a line sheet", in this case "basketball games and one football game" (D25a-11 to 12). Objection to the above testimony was made by counsel on the ground that the answer was "pure speculation" (D25a-17). The Court reserved his ruling (D25a-32). On cross-examination the witness admitted that Exhibit S-3 was not evidence of a bet or that a bet was "recorded on this sheet" (D35a-33 to 36), and in answer to the Court's questioning admitted that Exhibits S-1 and S-2 could represent other records which have nothing at all to do with betting of any kind (D37a-21 to 40). On re-cross examination the witness admitted that Exhibits S-1 and S-2 could represent any kind of a business transaction in the defendant's own business or personal transaction of the defendant (D38a-23). He further admitted that he could not pinpoint S-1 and S-2 as related in any way to gambling (D38a-25).

The above fairly summarizes the State's case at the time the motion for acquittal was made.

The court granted the defendant's motion as to the second count, holding that to permit the jury to determine whether or not the premises was a gambling establishment on the evidence presented would be speculative (D63a-7), but denied the defendant's motion as to the first count, holding that the statute is not limited to horse racing (D60a-18), that the Exhibits S-1, S-2 and S-3 in evidence were sufficient for a jury to infer that they were records of the defendant's operations in bookmaking, and that S-1 and S-2, in conjunction with S-3, and the telephone calls all raised jury questions (D61a-17 to 40).

The evidence in the case which the trial court concluded was sufficient for the jury as to the first count was this:

1. S-1 and S-2, which the State's expert said "could represent" a "tally" or "record" sheet (D24a-31 to 34; D25a-9) or could represent other records (D37a-20 to D38a-26) either personal or business.

2. S-3 which the State's expert said "could represent" a "line sheet" on "Basketball games and one football game" (D25a-5 to 12) but admitted on cross-examination did not indicate that an actual bet had been made (D35a-33 to D36a-10).

3. Two telephone calls asking for the defendant in which the Court acknowledged no bets were placed (D62a-12).

The basic federal question involved herein was raised by the petitioner herein at the time the motion was made before the trial court for a directed judgment of acquittal at the conclusion of the State's case (appendix to appellant's brief, 39a-20 *et seq.*, filed in the court below). The due process claim was expressly preserved by the petitioner herein in the brief for the defendant-appellant filed in the Superior Court of New Jersey (Appellate Division), at page 18, lines 25 to 32.

Reasons for Granting the Writ

The court below has rendered a decision inconsistent with the prior decisions of the State's highest court and also inconsistent with the decisions of the United States Supreme Court. The effect of this decision would be to deny to petitioner the due process of law guaranteed by the Fourteenth Amendment by permitting a conviction without any direct evidence of guilt.

Prior to the decision of the court below the recognized test employed in the State of New Jersey upon a motion to direct an acquittal was whether there was any legal evidence before the jury from which an inference of guilt could be legitimately drawn. *State* v. *Fox*, 12 N. J. Super. 132 (App. Div. 1951); *State* v. *Bricker*, 99 N. J. L. 521 (E. & A. 1924); *State* v. *Walsh*, 9 N. J. Super. 43 (App. Div. 1950).

The Supreme Court of the State of New Jersey in *State* v. *Donohue*, 2 N. J. 381, 390 (1949), set up the rule of law that was fully explained and applied in the case of *State* v. *Fox*, *supra*, where, Judge Bigelow of the Superior Court of New Jersey, speaking for the Court, said (p. 136):

> "In order to justify a conviction, the circumstances on which the State relies must be consistent with the defendant's guilt and also, and more important for present purposes, they must be inconsistent with any rational theory of innocence. *State* v. *Donohue*, 2 N. J. 381, 390 (1949). The cited case dealt with the question whether the verdict was against the weight of the evidence, and not with the precise problem now before us, namely, whether the trial court should have directed a verdict. *But when that is the problem and when the State relies upon circumstantial evidence, the inquiry is still whether the evidence excludes every reasonable hypothesis except that of guilt.* *State* v. *Boyd*, 137 N. J. L. 23, affirmed 137 N. J. L. 615 (E. & A.

1948). If the circumstances are fairly consistent with innocence, the inference of guilt cannot legitimately be drawn and judgment of acquittal should be granted." (Emphasis supplied.)

The effect of the ruling of the court below is to sanction a new rule which would require the defendant, in a case based on purely circumstantial evidence that does not exclude beyond a reasonable doubt every other hypothesis except that of guilt, to assume the burden of proving his innocence, contrary to all known principles of justice.

The opinion which is sought to be reviewed in connection with this point, says (24a *infra*):

> "The ingenuity of bookmakers and the sparcity of their recorded indicia have been frequently noted, and while courts must be alert to avoid the lessening of the procedural safeguards to which persons accused of bookmaking are fairly entitled, they must be equally alert to avoid the frustration of bookmaking prosecutions legitimately based on inferences which may reasonably be drawn from furtive conduct and scanty records. *Cf. State* v. *Kuznitz*, 36 N. J. Super. 521, 530 (App. Div. 1955), cert. denied, 20 N. J. 136 (1955).

The ruling of the court below is contrary to the holding of the United States Supreme Court in *Thompson* v. *City of Louisville*, 362 U. S. 199, 206, 80 St. Ct. 624, where the court said:

> "* * * so is it a violation of due process to convict and punish a man without evidence of his guilt."

The court in that case cites in the footnotes the following cases: *Schware* v. *Board of Bar Examiners of State of N. M.*, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796; *United States ex rel. Vajtauer* v. *Commissioner of Immigration*

of Port of New York, 273 U. S. 103, 106, 47 S. Ct. 302, 303, 71 L. Ed. 560; *Moore* v. *Dempsey*, 261 U. S. 86, 43 S. Ct. 265, 67 L. Ed. 543; *Yick Wo.* v. *Hopkins*, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220. *Cf. Akins* v. *State of Texas*, 325 U. S. 398, 402, 65 S. Ct. 1276, 1278, 89 L. Ed. 1692; *Tot* v. *United States*, 319 U. S. 463, 473, 63 S. Ct. 1241, 1247, 87 L. Ed. 1519 (concurring opinion); *Mooney* v. *Holohan*, 294 U. S. 103, 55 S. Ct. 340, 79 L. Ed. 791.

This Court should exercise its powers of supervision and inquire into the alleged lack of evidence which supported this conviction. If the holding of the court below is permitted to remain in effect, great injustice will result.

CONCLUSION

It is respectfully submitted that the questions raised are of such importance in the administration of the criminal law that there should be an authoritative determination of the same by this Court. Accordingly, petitioner asks that this Court issue a writ to review the judgment below.

Respectfully submitted,

JOSEPH F. WALSH.
Counsel for Petitioner.

[APPENDICES FOLLOW]

APPENDIX "A"

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed--February 27, 1961)

Argued February 14, 1961—Decided February 27, 1961 Before Judges Conford, Freund and Kilkenny.

Mr. John F. Ryan argued the cause for the appellant (Messrs. Ryan, Saros, Davis & Stone, attorneys); Mr. Bernard L. Davis on the brief).

Mr. Michael R. Imbriani, Assistant Prosecutor, argued the cause for the respondent (Mr. Arthur S. Meredith, Somerset County Prosecutor, attorney).

The opinion of the court was delivered by
Kilkenny, J.A.D.

A jury in the Somerset County Court found the defendant guilty of bookmaking in violation of *N.J.S.* 2A:112-3. The trial judge observed that this was the defendant's third conviction for bookmaking in Somerset County and sentenced him to a term of not less than 18 months nor more than 3 years in the New Jersey State Prison and fined him the sum of $5,000. The defendant appeals from his conviction.

The Somerset County Grand Jury returned a two-count indictment against the defendant. The First Count charged that the defendant "on the 9th day of January, 1960 and on divers days and dates prior thereto * * * willfully and unlawfully did conduct the practice commonly known as bookmaking, upon the outcome of sporting games and contests contrary to the provisions of *N.J.S.* 2A:112-3, * * *." The Second Count charged the defendant with keeping a

place to which persons might resort for gambling on the 9th day of January, 1960 and on divers days and dates prior thereto, contrary to the provisions of *N.J.S.* 2*A*:112-3.

At the conclusion of the State's case, the defendant moved for a judgment of acquittal of both offenses charged in the indictment. The court granted the defendant's motion as to the Second Count but denied the motion as to the First Count. After the presentation of the defendant's case, the jury found the defendant guilty of the charge contained in the First Count of the indictment. The defendant's motion for a new trial was denied. The court sentenced the defendant as noted above. The defendant's application that he be admitted to bail pending appeal was granted by the trial court.

Some of the reasons assigned by the defendant for reversal are clearly without merit and may be disposed of at the outset. For example, he argues that the "bookmaking" prohibited by *N.J.S.* 2*A*:112-3 comprehends bets on horse races only and does not apply to bets on basketball and football games, as is claimed by the State in the instant case. This contention was rejected in *State* v. *Maranz*, 18 *N. J. Super.* 478 (*App. Div.* 1952), certification denied 10 *N. J.* 309 (1952), in which Judge (now Justice) Jacobs, speaking for a unanimous court, said at *page* 482:

> "In the instant matter the independent clause upon which the defendant's indictment and conviction were based is not by its terms confined to bookmaking on horse races only and, as we have heretofore indicated we are satisfied that in view of its clear purpose and comprehensive phraseology (*See State* v. *Morano*, 133 *N. J. L.* 428, 430 (*Sup. Ct.* 1945), it must be construed to be applicable generally, as in reason it ought to be, to the commonly known practice of bookmaking, whether it be on horse races, basketball games, prize fights, or other events."

Appendix A

The defendant cites *State* v. *Morano*, 134 *N. J. L.* 295 (*E. & A.* 1946) as limiting "bookmaking" to bets on horse races. However, that case is distinguishable because, unlike the indictment here and in the Maranz case, the charge in the Morano indictment was that defendant "would make and take what is commonly known as a book, upon the running of horses, mares and geldings." This refers to the second alternative prohibition of *N.J.S.* 2A:112-3. Here, as in the *Maranz* case, the defendant was indicted for violating the third alternative prohibition of this statute, which reads in conjunction with the introductory words: "Any person who, habitually or otherwise * * * conducts the practices commonly known as bookmaking or pool selling, * * * is guilty of a misdemeanor * * *."

As thus read and understood, the statute is not limited to bets on horse races, but covers the practice of bookmaking, "whether it be on horse races, basketball games, prize fights, or other events," as construed in *Maranz*, *supra*. Furthermore, the action prohibited under the third subdivision is proscribed, whether the bookmaking is carried on "habitually" or "otherwise."

The defendant argues that the word "practices" in *N.J.S.* 2A:112-3 implies that the statute cannot be violated by showing that the defendant took book on one date, January 9th, 1960, although it was alleged otherwise in the indictment. He draws the analogy that "practice" of law requires more than engagement in a single matter and points to the definition of "practice" in *Black's Law Dictionary*, 4th ed. page 1335, as "repeated or customary action; habitual performance; a succession of acts of similar kind; habit; * * * the exercise of any profession." It is noteworthy that even in this definition the word "practice" has a secondary meaning, namely, the exercise of any profession. Therefore, it is possible for one to conduct "the practices commonly known as bookmaking" by the

exercise of that "profession" on a single date. We are not persuaded by the argument that a person cannot conduct the practice of bookmaking or be guilty of violating the statute, without a showing of violations on more than one day.

The defendant contends that the trial court erroneously charged the jury when it said:

> "It is not necessary in order to sustain a conviction under this indictment that the evidence shows that this defendant made or accepted any bets as a principal or that he had the responsibility as a bookmaker of paying off any bets that were made. It is sufficient to warrant a conviction if you find from all of the proof beyond a reasonable doubt that he knowingly and intentionally aided, abetted or participated in the prohibitive practice of bookmaking. Under our law all who aid, abet or participate in bookmaking are principals of equal guilt."

We find no error in that portion of the charge.

As stated in *Paterson Publishing Co.* v. *New Jersey Bell Telephone Co.*, 21 *N. J.* 460 (1956), at *p.* 465: "Bookmakers and those who aid and abet them are equally condemned by the policy of our law. See *N.J.S.* 2A:112-3; *N.J.S.* 2A:85-14; *State* v. *Morano*, 134 *N. J. L.* 295, 301 (*E. & A.* 1946)."

In *State* v. *Morano*, *supra*, the accused also claimed to be entitled to an acquittal upon the argument that there was no evidence that the defendants "made or accepted any bets as principals, or had the responsibility, as bookmakers, of paying off any bets that were made," and, "at best" they were mere aiders or abettors, and were not indicted as such. The defendants in that case argued, as does the defendant here, that where the statute renders aiding, abetting or assisting in the commission of a misdemeanor a separate and distinct offense, the general rule that such

aiders and abettors are indictable as principals is not applicable. However the court disposed of the defendant's contention in these words, at *p.* 301: "Under the common law, all who are present, aiding and abetting in a felony, are treated as principals, while in the case of misdemeanors all who aid, abet or participate are deemed principals of equal guilt; and the statute under consideration is in this regard merely declaratory of the common law." From this it would appear that one who aids or abets the commission of the offense prohibited by *N.J.S.* 2A:112-3 is a principal, and that the charge of the court to the jury that the defendant could be convicted of the offense, upon proof beyond a reasonable doubt that he aided and abetted the commission of the offense, was proper.

In *State* v. *Western Union Telegraph Company*, 12 *N. J.* 468, 495 (1953), the defendant's claim that there was error in the court's charge on aiding and abetting as it was utterly foreign to the proof, was disposed of in these words: "The distinction between principal and accomplice or aider and abettor has been abolished in our jurisdiction for the purposes of indictment and punishment. See *State* v. *Cooper*, 10 *N. J.* 532 (1952). We see nothing prejudicial in this respect warranting relief." We believe that that language is equally applicable here.

We turn now to a more substantial contention by the defendant. One of the reasons urged by him for reversal is the trial court's denial of his motion for acquittal at the conclusion of the State's case. It is well settled that if, at the end of the State's case, the evidence was insufficient to make a case for the jury, the denial of a motion for a judgment of acquittal is considered to work manifest wrong to the accused and to be ground for reversal. This is so, even though later in the case evidence was received sufficient to establish the defendant's guilt. In this latter respect, the rule in criminal practice is contrary to that followed in

civil cases. *State* v. *Fox*, 12 *N. J. Super.* 132, 135 (*App. Div.* 1951). See also, *State* v. *Pruser*, 127 *N. J. L.* 97 (*Sup. Ct.* 1941); and *State* v. *Bacheller*, 89 *N. J. L.* 433 (*Sup. Ct.* 1916). Accordingly, in appraising this asserted ground for reversal, we shall consider only the evidence in the record at the time when the defendant made his motion for acquittal.

The evidence in this case was essentially circumstantial. There was no direct proof of bookmaking by the defendant and he made no confession. The State's two witnesses established the following. Richard A. Martin, an investigator with the New Jersey State Police, armed with a search warrant, and accompanied by Joseph Karkowski, a detective with the State Police, entered the gasoline service station building in North Plainfield where the defendant and another conducted a business at about 1 p.m. on January 9, 1960. They found the defendant standing in the center of the room. There were some customers present and an employee. Martin identified himself and explained to the defendant his purpose in being there.

Martin searched the defendant after asking him to take everything he had from his pockets and place the same onto a cigarette machine which was on the right-hand side of the office. The defendant emptied his pockets as requested, and Martin thereupon searched his pockets and found nothing therein. Among the contents emptied from the defendant's pockets were two small slips of paper, exhibits S-1 and S-2, hereinafter considered. While the search was being conducted, the telephone rang on two occasions and Martin answered both calls. The first caller identified himself by the name of "Jimmy" and asked for "Tony." When Martin advised him that Tony was not available to answer the phone, Jimmy allegedly said, "If I can't talk to Tony I don't want to talk to anyone." The second call, more than an hour later, was from a person who identified him-

self as "Freddie, the brother-in-law to Tony." When Martin asked the defendant if he had a brother-in-law named Freddie, the defendant said that he did not. When Martin told Freddie that Tony was not available to answer the call, Freddie allegedly said that "if he couldn't talk to Tony, he didn't want to talk to anyone."

Martin testified that after the first call:

> ... • • • I had my back to Mr. Fiorello, who was then standing next to the cigarette machine. When I had my back to him I heard a crackling of paper. I turned around and Mr. Fiorello had his hands folded behind his back. I then grabbed his left hand and in the palm of his hand he had a folded piece of paper • • • and when we opened the palm of his hand there was a slip of paper in his palm."

The slip of paper which defendant had in his hand was marked in evidence as exhibit S-3, which we shall discuss hereafter. A complete search of the premises was made by the two members of the State Police and, in fact, the defendant was required to undress completely in the men's room. That complete search failed to turn up as possibly incriminating evidence anything beyond the exhibits S-1, S-2 and S-3. At no time did the defendant make any admissions that he was engaged in th business of bookmaking or that the aforesaid three exhibits were connected with any bookmaking.

Karkowski, a detective sergeant with the New Jersey State Police and a member thereof for ten years, had conducted gambling investigations for the State Police from 1954 to date. He participated in at least 50 gambling investigations in most of the counties throughout the state and as a result thereof had become familiar with the records, symbols and writings connected with the activity of bookmaking. He had examined such writings and symbols

Appendix A

at least 100 times, was familiar with the jargon used by those engaged in bookmaking and with publications and paraphern. lia associated with bookmaking and with betting on basketball and other games. He explained the *modus operandi* in making a bet on a game. His qualifications as an expert were sufficiently established.

Karkowsi was shown the three exhibits marked in evidence as exhibits S-1, S-2 and S-3. He testified that, based on his experience in having examined many slips pertaining to gambling, S-1 and S-2 "could" represent what is commonly known in bookmaking as a tally sheet or a record sheet; and S-3 "could" represent what is commonly known as a "line sheet," indicating the particular game, point spread by which the favorite is expected to win, and the starting time of the game. When Karkowski was asked whether S-3 could represent anything else besides a line sheet, he declared, "In my opinion it's nothing but a line sheet with the added feature of having apparent time records made for each contest. That is the time those games were scheduled to be played, to begin to be played." Anything originally conjectural about his opinion as to S-3, inherent in his original use of the word "could," was thereafter made an absolute opinion by him which he was qualified to give. This opinion as to the nature of S-3 is confirmed by the defendant's admission to detective Martin that he had written that information on S-3 after copying it from the Newark Star Ledger that morning.

The court pressed an inquiry as to Karkowski's use of the word "could" with reference to S-1 and S-2. The witness had testified that they could represent tally or record sheets, but then admitted that they also "could represent records of diversified kinds," which have nothing at all to do with betting of any kind. He frankly conceded this "possibility." On further re-cross examination, he conceded that they could represent any kind of a business

transaction in the defendant's own business, and then appeared the following testimony.

> "Q. You cannot then, therefore, pinpoint [S-1 and S-2] as related in any way to gambling? A. No, sir."

Karkowski never gave in his testimony any flat opinion that S-1 and S-2 were tally or record sheets used in bookmaking. The furthest he went was to say:

> "This resembles [gambling] sheets that I have examined in the past. In all honesty it could represent other records."

Such, in substance, was the evidence presented by the State when it rested and when the defendant made his motion for an acquittal. The accepted standard by which to test the propriety of the trial court's ruling on a motion for acquittal in a circumstantial evidence case is "whether the evidence before the trial court, viewed in its entirety, giving the State the benefit of all legitimate inferences therefrom, was such that the jury could properly find, beyond a reasonable doubt," that the defendant was guilty of the crime charged. *State* v. *Goodman*, 9 *N. J.* 569, 581 (1952); *State* v. *Dancygier*, 29 N. J. 76, 84 (1959); *State* v. *Hall*, 55 *N. J. Super.* 441, 447 (*App. Div.* 1959); *State* v. *Graziani*, 60 N. J. *Super.* 1, 13 (*App. Div.* 1959), affirmed o.b. 31 *N. J.* 538 (1960), certiorari denied 363 *U. S.* 830 (1960).

The circumstantial evidence in this case was not sufficient, when the defendant made his motion for acquittal, to permit the jury to find beyond a reasonable doubt that the defendant was guilty of the crimes charged in the indictment. An analysis of the State's evidence will confirm that opinion.

Appendix A

The telephone calls from "Jimmy" and "Freddie", which were the only phone calls received between 1 p.m. when Martin and Karkowski arrived, and 2:45 p.m. when they left, may have been suspicious, especially when Freddie claimed to be a brother-in-law, which relationship the defendant promptly denied. But there was nothing incriminatory in those calls. No effort was made by them to place a bet, and Martin, on cross-examination, would not admit that he even tried to get the callers to place a bet. Purely negative in character, these two phone calls received over a time interval of an hour and 45 minutes are consistent with innocence and not probative of guilt.

S-1 and S-2 are substantially the same, in that they contain letters and figures in the defendant's handwriting without any further descriptive information. Thus we observe on S-1: D 268—M 199—A 380—B 48—S 20—W 220. S-2 has a similar list of six figures but they are not the same as those on S-1. It seems clear that if the State's expert could not express an opinion that S-1 and S-2 related to gambling, but merely that they resembled papers which in other cases were found to be gambling data, and expressed the opinion that these exhibits could represent records of diversified kinds which have nothing at all to do with betting, a jury could not fairly and reasonably find that S-1 and S-2 were evidence of bookmaking by the defendant. If there were doubt in the mind of the expert in characterizing these slips of paper, the minds of the jurors could not be free from the doubt which such testimony would probably generate.

S-3 unquestionably was a so-called "line sheet" in that it set forth the names of four or five basketball games and one football game, together with the respective point spreads, and the starting times of the games. The defendant's admission to Martin was enough to establish this fact. But the defendant's possesssion of this information,

which he had copied from the morning newspaper, does not *per se* constitute evidence of guilt of bookmaking. Such information, readily available in the newspapers can be used by persons intending to place an isolated bet or bets, as well as by a bookmaker who takes a bet. The defendant was not charged with betting or attempting to place a bet.

We appreciate that we must view the evidence in its entirety, and that evidence may cumulatively constitute a case for the jury, notwithstanding separate items considered alone may not. *State* v. *Rhoms*, 14 *N. J.* 282, 285 (1954). We have examined the proofs as a whole, but we are satisfied that the State had not presented sufficient evidence at the time of the defendant's motion for acquittal at the end of the State's case from which the jury could fairly find beyond a reasonable doubt that the defendant was guilty of the crimes charged against him. The defendant's obvious lack of credibility, as shown by his evasive and incredible answers in explanation of S-1 and S-2, when he took the stand in his own defense, and by his two prior convictions for bookmaking, probably led to his conviction. But these circumstances do not justify the error in denying the defendant's motion for an acquittal at the end of the State's case because of the insufficiency of proof at that time. See *State* v. *Donohue*, 2 *N. J.* 381, 390 (1949). Any other view would conflict with the fundamental principle of protecting the rights of defendants in criminal cases, and would weaken the rule that a defendant is not required to take the stand in his own defense, but may put the State to proof of his guilt beyond a reasonable doubt on its own case.

The judgment of conviction is reversed and the cause is remanded for proceedings not inconsistent with this opinion. We deliberately refrain from ordering a judgment of acquittal in observance of the general rule requiring a remand, as pointed out in *State* v. *Croland*, 31 *N. J.* 380, 384

(1960). We also refrain from making a new trial positively mandatory, as explained in *State* v. *Lamoreaux*, 20 *N. J. Super.* 65 (*App. Div.* 1952), cited with approval in *State* v. *Croland*. After noting in *State* v. *Lamoreaux* that a retrial, after a reversal for failure of proof, would not place the defendant in double jeopardy, this court said at *p.* 76:

> "The availabilty of the proof required is within the knowledge of the prosecuting official, whose function it is, in such cases, to resolve whether the indictment should be dismissed or the defendant placed again on trial."

Reversed and remanded.

APPENDIX "B"

Opinion of the Supreme Court of New Jersey (No. A-15, September Term, 1961)

Argued September 25, 1961. Decided November 6, 1961.

Mr. Michael R. Imbriani, Assistant Prosecutor of Somerset County, argued the cause for the appellant (Mr. Arthur S. Meredith, Somerset County Prosecutor, Attorney).

Mr. John F. Ryan argued the cause for the respondent (Messrs. Ryan, Saros, Davis & Stone, Attorneys; Mr. Bernard L. Davis, on the brief).

The opinion of the Court was delivered by
JACOBS, J.

The defendant was found guilty of bookmaking by a Somerset County jury and, after the denial of his motion for a new trial, was duly sentenced by Judge Halpern. The Appellate Division reversed and remanded the cause for further proceedings. We certified on the State's application. 34 N. J. 472 (1961).

On January 9, 1960, Investigator Martin and Detective Karkowski of the New Jesey State Police went to the defendant's gasoline service station in North Plainfield. They had a search warrant and made a search of the premises. In the course thereof, Investigator Martin searched the defendant and asked him to place everything in his pockets on a nearby cigarette machine. This was apparently done and the investigator testified that "there was nothing left" in the defendant's pockets. Included among the items from the defendant's pockets were two slips of paper which were marked as Exhibits S-1 and S-2. They were in the defendant's handwriting and contained lists of numbers preceded

by letters. While the search of the premises was going on the telephone rang on two occasions and Investigator Martin answered the calls. The first caller asked for Tony and when he was told that Tony was not available, he said that if he could not talk to Tony he did not want to talk to anyone. The second call, more than an hour later, was from a person who identified himself as Freddie, the brother-in-law of Tony. He said that if he could not talk to Tony, he did not want to talk to anyone. The defendant at the time told the investigator that he had no brother-in-law named Freddie.

The investigator testified that after he had answered the first telephone call and while he had his back to the defendant, he heard a crackling of paper. He turned around and saw that the defendant had his hands folded behind his back. He then "grabbed" the defendant's left hand and when the defendant's hand was opened "there was a slip of paper in his palm;" this was received in evidence and marked as Exhibit S-3. The slip was in the defendant's handwriting and contained information which the defendant said he had obtained from the Newark Star Ledger. When the investigator asked the defendant what the information on the slip represented, the defendant stated that the list of names on the slip represented teams, the numbers next to them represented point spreads and the next notations were the times that the games were to be played. When the investigator asked the defendant why he had not put S-3 on the cigarette machine along with S-1 and S-2 the defendant said that he "didn't know it was in his pocket at that time." On cross examination the investigator repeated his earlier testimony that he had searched the defendant's pockets thoroughly and that S-3 was not there at the time. When the defendant's wallet was searched it was found to contain $164 in bills and $1 in change.

Appendix B

Detective Karkowski testified that since 1954 he had conducted numerous gambling investigations for the State Police and was familiar with the records, symbols and writings used in connection with bookmaking. He stated that Exhibits S-1 and S-2 could represent tally or record sheets and that Exhibit S-3 could represent "what is commonly known as a line sheet." He described a line sheet as a slip of paper or a prepared form which gives the names of "the favorite teams or any teams playing in sporting contests" and "usually the names are followed by points which are the points that that particular team is favorite to win the contest by." When asked by counsel whether S-3 could represent anything other than a line sheet he said, "In my opinion, it's nothing but a line sheet with the added feature of having apparent time records made for each contest. That is the time those games were scheduled to be played, to begin to be played." In response to an inquiry from the court, the detective reasserted that in his opinion S-3 was a line sheet and could not represent anything else but a line sheet. The detective testified that he examined S-3 and checked it against the Newark Star Ledger; he found that the information in the Ledger did not correspond with the information on S-3 and that the newspaper did not carry most of the starting times. In response to an inquiry from the court as to whether S-1 and S-2 could represent anything other than tally or record sheets, the detective testified that they resembled tally sheets or records of gambling activities which he had seen in the past, but they could represent other records. When he was asked whether they could represent other records which have nothing at all to do with betting, he said, "It's a possibility, yes, sir."

After Investigator Martin and Detective Karkowski had testified, the state closed its case. Thereupon the defendant moved for acquittal of the offenses charged in the two

counts set forth in the indictment. The court granted the defendant's motion as to the second count which charged the defendant with keeping a place to which persons might resort for gambling. It denied the motion as to the first count which charged that the defendant had, on January 9, 1960 and on other days, conducted the practice commonly known as bookmaking in violation of *N.J.S.* 2A:112-3. On his own case the defendant testified that he was not engaged in the practice of bookmaking. He stated on direct examination that the items listed on S-3 were "basketball odds" which he had taken from the newspaper and that he "was going to see one of these games at either the Madison Square Garden or at Philadelphia." However, on cross examination it was brought out that of the five games listed on S-3, one was played in Illinois, another in Ohio, another in Missouri, and another in the South. With respect to the fifth game, the evidence was silent as to where it was actually played, but there was proof that it could not have been played at Madison Square Garden. In response to an inquiry on direct examination as to what the figures on S-2 represented, the defendant testified that they were "figures of various things that I had taken down." He stated that he did not recall all of them but that he knew that "one here, S-67, could pertain to—I owed somebody $67.00, the S & H Green Stamps, and I know that B-95 was money that I had given to somebody and I kept a notation of it, and things like that." However, on cross examination he stated that he could not tell what the "B" stood for. The defendant testified that S-1 was merely a duplication of S-2 but on cross examination he acknowledged that only one of the six numbers on the exhibits was the same. The many contradictions in the defendant's testimony indicated his lack of credibility and, in addition, he admitted that he had been convicted in Union County in 1949 for bookmaking and maintaining premises for gambling

purposes, and in Somerset County in 1957 for bookmaking and keeping a gambling resort. At the close of all of the testimony the court delivered its charge and after due deliberation the jury returned its verdict of guilty.

In the Appellate Division the defendant attacked his conviction on various grounds which were passed upon in the court's opinion. It summarily rejected the defendant's contention that while *N.J.S.* 2A:112-3 prohibits the practice of bookmaking on horseraces, it does not prohibit the practice of bookmaking on other contests such as basketball games. The Appellate Division's ruling on this issue was clearly correct and is not now questioned by the defendant. See *State* v. *Marano*, 18 N. J. Super. 478 (App. Div. 1952), *cert. denied*, 10 N. J. 309 (1952). The Appellate Division also rejected the defendant's contention that Judge Halpern committed prejudicial error when he charged the jury that it was not necessary that the defendant be a principal but that it was sufficient if the jury found "from all of proof beyond a reasonable doubt" that the defendant "knowingly and intentionally aided, abetted or participated in the prohibited practice of bookmaking." The defendant now attacks the Appellate Division's ruling on this issue but we find no merit whatever in his attack. Bookmakers and those who aid and abet them are equally condemned by the policy of our law and are all dealt with as principals. See *Paterson Publishing Co.* v. *N. J. Bell Telephone Co.*, 21 N. J. 460, 465 (1956); *State* v. *Marano*, 134 N. J. L. 295, 301 (E. & A. 1946). Under the proofs and under an entirely fair charge, the jury found that the defendant was guilty of engaging in the practice of bookmaking. Any involvement of others was immaterial and would not have constituted a defense; in this connection it may be noted that the trial court explicitly charged that a bettor as such was not guilty of any crime under *N.J.S.* 2A:112-3 and clearly the jury would not have found the defendant guilty of

bookmaking if it had believed that he was simply a bettor. In any event, the reference to aiding and abetting did not prejudice the substantial rights of the defendant and was not reversible error. *Cf. State* v. *Western Union Telegraph Co.*, 12 N. J. 468, 495 (1953), *appeal dismissed*, 346 U. S. 869, 98 L. Ed. 379 (1953).

The defendant contends that the evidence at the close of the State's case was insufficient to go to the jury and that his motion for acquittal at that time should have been granted by the trial judge. It is this contention which was accepted by the Appellate Division and led it to reverse the judgment of conviction. Our courts have held that the validity of the denial of a motion to acquit at the end of the State's case is to be tested in the light of the evidence at that time without reference to any corroborative evidence introduced during the defendant's case. See *State* v. *Fox*, 12 N. J. Super. 132, 135 (App. Div. 1951); *State* v. *Pincus*, 41 N. J. Super. 454, 458 (App. Div. 1956); *cf. State* v. *O'Shea*, 28 N. J. Super. 374, 378 (App. Div. 1953), *aff'd*, 16 N. J. 1 (1954). Although there are many cases elsewhere which have in effect reached a different result (see, *e.g.*, *United States* v. *Calderon*, 348 U. S. 160, 164, 99 L. Ed. 202, 207 (1954); *United States* v. *Kenny*, 236 F. 2d 128, 131 (3d Cir. 1956), *cert. denied*, 352 U. S. 894, 1 L. Ed. 2d 87 (1956); Anot., 17 A.L.R. 910, 925 (1922), we may, for present purposes, assume the validity of the holdings in our courts, although we hasten to point out that under them the State is admittedly entitled to the benefit of all of its favorable testimony and the favorable inferences which a jury might reasonably draw therefrom. *Cf. State* v. *Rhams*, 14 N. J. 282, 285 (1954); *State* v. *Cerce*, 22 N. J. 236, 246 (1956); *State* v. *Dancyger*, 29 N. J. 76, 84 (1959), *cert. denied*, 360 U. S. 903, 3 L. Ed. 2d 1255 (1959).

Appendix B

Various expressions of the test to be applied in passing on a motion for acquittal may be found in the cases. In *State* v. *Picciotti*, 12 N. J. 205, 208-209 (1953), the test was stated to be "whether there is any legal evidence before the jury from which an inference of guilt can be legitimately drawn." See also *State* v. *Smith*, 32 N. J. 501, 521 (1960), *cert. denied*, 364 U. S. 936, 5 L. Ed. 2d 367 (1961); *State* v. *Kollarik*, 22 N. J. 558, 564 (1956); *State* v. *Rogers*, 19 N. J. 218, 232 (1955); *State* v. *Bogan*, 58 N. J. Super. 185, 193 (App. Div. 1959), *aff'd*, 34 N. J. 35 (1961). The test has often been stated without any distinction between direct and circumstantial evidence. However, in *State* v. *Donohue*, 2 N. J. 381, 390 (1949), the Court expressed the sweeping view that where the State's evidence is circumstantial, "all of the circumstances not only must concur to indicate a defendant's guilt but they must also be inconsistent with any other rational conclusion," and they must exclude "every other hypothesis except that of guilt." Although this broad expression has been occasionally restated it has not been applied literally; if it were it would have unreasonably defeated many legitimate prosecutions based on circumstantial evidence where it was possible "to devise speculative hypotheses consistent with defendant's innocence." See *People* v. *Sullivan*, 22 Ill. 2d 122, 174 N.E. 2d 860, 861 (1961). The formulation found in *Donohue* has been effectively criticized elsewhere (see *United States* v. *Valenti*, 134 F. 2d 362, 364 (2d Cir. 1943), *cert. denied*, 319 U. S. 761, 87 L. Ed. 1712 (1943)), has been restrictively explained (*State* v. *Bulna*, 46 N. J. Super. 313, 317 (App. Div. 1957), *aff'd*, 27 N. J. 93 (1958))[1] and has been abandoned in recent opinions

[1] In *Bulna*, the court suggested that the *Donohue* formula may be a proper one for application by the jury. However, we consider the better approach to be that taken in *Holland* v. *United States*

(Continued on following page)

by our courts. See *State* v. *Goodman*, 9 N. J. 569, 581 (1952); *State* v. *Dancyger*, *supra* at 84; *State* v. *Graziani*, 60 N. J. Super. 1, 13 (App. Div. 1959), *aff'd*, 31 N. J. 538 (1960), *cert. denied*, 363 U. S. 830, 4 L. Ed. 2d 1524 (1960); *State* v. *Hall*, 55 N. J. Super. 441, 447 (App. Div. 1959).

In *Goodman*, *supra*, the defendants were convicted on a charge of conspiracy to extort and their appeal was heard in this Court. Their motion for acquittal at the close of the State's case had been denied, and this action was readily sustained though it was acknowledged that the evidence was circumstantial and certain of the defendants' actions which were relied upon by the State, when isolated from other circumstances, appeared innocent. In the course of its opinion this Court, citing *United States* v. *Valenti*, *supra*, stated that the real question at the close of the State's case "was whether the evidence, viewed in its entirety, was such that the jury could properly find therefrom, beyond reasonable doubt, that the four defendants

---

(Continued from preceding page)

348 U. S. 121, 99 L. Ed. 150 (1954), where the Court sustained a trial judge's refusal to instruct that where the government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt; after noting that where the jury is properly instructed on standards for reasonable doubt, such additional instruction on circumstantial evidence may be confusing, Justice CLARK had this to say:

> "Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." 348 U. S. at 140, 99 L. Ed. at 166-167

had corruptly agreed to extort." 9 N. J. at 581. In *Dancyger, supra*, the defendant was charged with theft of a ring. At the close of the State's case he moved for acquittal but his motion was denied and the jury later found him guilty. On appeal he urged that the evidence "did not exclude a reasonable hypothesis of innocence of the theft charge" and that he was therefore entitled to acquittal. In rejecting this contention Justice Proctor, writing for the entire Court, pointed out that if the evidence was of sufficient quality to convince a jury beyond a reasonable doubt of the defendant's guilt it did not matter that it was circumstantial; citing *Goodman*, he stated that the question before the trial court at the close of the State's case was "whether the evidence viewed in its entirety and giving the State the benefit of all the legitimate inferences therefrom, was such that the jury could properly find beyond a reasonable doubt" that the defendant had stolen the ring. 29 N. J. at 84.

In *State* v. *Hall, supra*, the test set forth in *Dancyger* was applied to sustain the denial of a motion to acquit where charges of breaking and entering and larceny were supported by circumstantial evidence. In *State* v. *Graziani, supra*, the defendants were convicted of unlawfully conspiring to obtain money by false pretenses. They had moved for acquittal at the end of the State's case on the ground that the evidence against them was circumstantial and "did not exclude every reasonable hypothesis except that of guilt." In sustaining the trial court's denial of their motion to acquit, the Appellate Division accurately set forth the now controlling approach:

> "The issue for the trial court and for us is not whether the circumstantial evidence excluded every reasonable hypothesis except that of guilt. *State* v. *Bulna*, 46 N. J. Super. 313, 317 (App. Div. 1957),

affirmed 27 N. J. 93 (1958). The issue to be decided is instead whether the evidence before the trial court, viewed in its entirety, and giving the State the benefit of all legitimate inferences therefrom, was such that the jury could properly find, beyond a reasonable doubt, that the defendants had corruptly agreed to obtain money by false pretenses from purchasers and prospective purchasers of motor vehicles. This is the accepted standard by which to test the propriety of the trial court's ruling on defendants' motions. *State* v. *Goodman*, 9 N. J. 569, 581 (1952); *State* v. *Dancyger*, 29 N. J. 76, 84 (1959); *State* v. *Hall*, 55 N. J. Super. 441, 447 (App. Div. 1959)." 60 N. J. Super. at 13

See *United States* v. *Guiliano*, 263 F. 2d 582, 584 (3d Cir. 1959); *White* v. *United States*, 279 F. 2d 740, 748 (4th Cir. 1960), *cert. denied*, 364 U. S. 850, 5 L. Ed. 2d 74 (1960); *cf. United States* v. *Costello*, 221 F. 2d 668, 671 2d Cir. 1955), *aff'd*, 350 U. S. 359, 100 L. Ed. 397 (1956); but see *Riggs* v. *United States*, 280 F. 2d 949, 953-955 (5th Cir. 1960). *Compare Holland* v. *United States*, 348 U. S. 121. 139-140, 99 L. Ed. 150, 166-167 (1954) *with State* v. *Bulna*, *supra*, 46 N. J. Super. at 317; see also Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 *Yale L. J.* 1149, 1152-1163 (1960); *Note, Sufficiency of Circumstantial Evidence in a Criminal Case*, 55 *Colum. L. Rev.* 549, 500 (1955).

When the trial court was called upon to determine whether the State, on its own case, had presented enough evidence to go to the jury, it was properly governed by the aforementioned standard. Its obligation was to view the State's evidence in its entirety, giving the State the benefit of all of its favorable testimony as well as all of the favorable inferences which reasonably could be drawn therefrom. Viewing the evidence in that light, the trial

court was satisfied that a reasonable jury could find beyond a reasonable doubt that the State had established that the defendant did conduct the practice of bookmaking as charged in the indictment. That being so, its duty was to deny the motion for acquittal and thereafter receive the testimony in support of the defense. We are convinced that its action in denying the motion was soundly taken. The State's expert witness testified that he was familiar with writings connected with bookmaking, that S-3 was a line sheet bearing the names, point spreads and starting times of basketball games, and that S-1 and S-2 could be tally or record sheets. It may fairly be inferred from the evidence, that during the search of the premises the defendant had concealed S-3, which was in his own handwriting, and was seeking to suppress it. Such attempt to suppress was an evidential circumstance which tended to establish guilt and negate any suggested inference that the possession of the line sheet was innocent. See *State* v. *De Falco*, 8 N. J. Super. 295, 299-300 (App. Div. 1950); *State* v. *O'Shea*, *supra*, 28 N. J. Super. at 377. In addition, the State's case contained evidence that the defendant had falsely stated at the time that S-3 merely contained information which had been copied from the Star Ledger. *Cf. Commonwealth* v. *Lettrich*, 346 Pa. 497, 31 A. 2d 155, 156 (1943), where the court noted that an accused's fabrication "for the sake of diverting inquiry or casting off suspicion" is a circumstance "indicatory of guilt."

The State's expert witness testified that S-1 and S-2, which were also in the defendant's own handwriting, could be tally or record sheets, and that they resembled tally sheets or records found during gambling investigations he had conducted in the past. The defendant points out that the witness did not state that S-1 and S-2 were tally or record sheets, or were probably such, but simply stated that they could be such. He urges that this testimony

should have been excluded by the trial court but we consider that under the circumstances the evidence was properly received. While the witness acknowledged the possibility that S-1 and S-2 might be unrelated to gambling, his acknowledgment was simply an admission of something self-evident, for S-1 and S-2 merely contained an enumeration of letters and figures and no one could truthfully deny the possibility that they might be records of legitimate transactions. S-1 and S-2 were in themselves proper evidential items (*cf. State* v. *Martinek*, 12 N. J. Super. 320, 325-324 (App. Div. 1951)), they were not to be viewed in isolation (*cf. State* v. *Rhams, supra*, 14 N. J. at 285), and when coupled with all the other circumstances in the case and particularly with S-3, a jury could reasonably infer that they were tally or record sheets being used in a bookmaking operation. The ingenuity of bookmakers and the sparcity of their recorded indicia have been frequently noted, and while courts must be alert to avoid the lessening of the procedural safeguards to which persons accused of bookmaking are fairly entitled, they must be equally alert to avoid the frustration of bookmaking prosecutions legitimately based on inferences which may reasonably be drawn from furtive conduct and scanty records. *Cf. State* v. *Kuznitz*, 36 N. J. Super. 521, 530 (App. Div. 1955), *cert. denied*, 20 N. J. 136 (1955).

We are satisfied that the trial court properly denied the defendant's motion for acquittal and that the Appellate Division's ruling to the contrary was erroneous. We are also satisfied that there is no merit to the defendant's present alternative contention that the verdict of the jury was against the weight of the evidence. The State's case was not at all weakened by anything introduced on the defendant's case; on the contrary it was strengthened by the incredibility of the defendant's explanatory testimony and the jury acted well within its province in reaching its

verdict of guilty. In any event, the rule is well settled that this Court will not set aside a jury verdict in the absence of a clear and convincing showing that the verdict was the result of mistake, partiality, prejudice or passion. No such showing has been made and we have no hesitancy in concluding that, within the aforementioned rule and on the basis of all of the evidence in the case, the jury's verdict may not be disturbed. See *State* v. *Goodman*, *supra*, 9 N. J. at 582; *cf. State* v. *Dunphy*, 24 N. J. 10, 17 (1957); *State* v. *Smith*, *supra*, 32 N. J. at 523-524.

The judgment of the Appellate Division is Reversed and the judgment of conviction entered in the Somerset County Court is reinstated.

APPENDIX "C"

Mandate on Reversal of the Supreme Court of New Jersey

(Filed—November 6, 1961)

This cause having been duly argued before this Court by Mr. Michael R. Imbriani, counsel for the appellant, and Mr. John F. Ryan, counsel for the respondent, and the Court having considered the same,

It is hereupon order and adjudged that the judgment of the said Superior Court—Appellate Division is in all things reversed, set aside and for nothing holden, with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be remitted to the said Superior Court—Appellate Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the sixth day of November, 1961.

JOHN H. GILDEA
Clerk of the Supreme Court